

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NEXTEER AUTOMOTIVE CORP.)	
)	
and)	
)	Case No. 07-CA-215036
LOCAL 699, INTERNATIONAL UNION,)	
UNITED AUTOMOBILE, AEROSPACE)	
AND AGRICULTURAL IMPLEMENT)	
WORKERS OF AMERICA (UAW), AFL-CIO)	

**BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION AND FOR A STAY
OF PROCEEDINGS PENDING THE DISPOSITION OF
GENERAL MOTORS, LLC, 368 NLRB NO. 68 (2019)**

Respondent Nexteer Automotive Corp. has moved for reconsideration of the Board’s decision in the instant case based on the unusual circumstance that just nine (9) days after the decision here, the Board issued a Notice and Invitation to File Briefs (“Notice”) in *General Motors, Inc.*, 368 NLRB No. 68 (September 5, 2019), indicating the intent to reconsider the manner by which the four-factor test set forth in *Atlantic Steel*, 245 NLRB 814, 816 (1979) should be applied to misconduct occurring in the course of otherwise protected activity. Given that the Administrative Law Judge’s decision in this case rigidly applied the *Atlantic Steel* test by giving equal weight to each of the four factors¹ and relied extensively on *Plaza Auto Center*, 360 NLRB 972 (2014)—which the Notice specifically highlights as problematic—citing it no less than six (6) times in support of the finding of a violation,² Respondent submits that this case should be stayed and reevaluated once the proper standard is established in proceedings in *General Motors*.

Respondent’s Motion for Reconsideration is timely under NLRB Rules and Regulations § 102.48(c)(2). As such, this case is active and should fall within the Board’s “usual practice to apply new policies and standards retroactively ‘to all pending cases in whatever stage.’” *SNE*

¹ 368 NLRB No. 47 at 11.

² 368 NLRB No. 47 at 7, 8, 9.

Enterprises, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958)). *See also MV Transportation, Inc.*, 368 NLRB No. 66 at page 12 (2019).

Until the new appropriate standard is established, it cannot be said whether the misconduct of Joshua Nuffer-Bauer lost protection under the Act. While the judge held that Nuffer-Bauer remained protected, he did so based on an equal weighting of the four *Atlantic Steel* factors. Moreover, when assessing the “nature of the outburst” factor from *Atlantic Steel*, the judge placed heavy reliance of the Board’s opinions in *Plaza Auto Center* and *Pier Sixty LLC*, 362 NLRB 505 (2015), *enf’d*. 115 (2d Cir. 2017).³ The Board’s Notice specifically indicates an intention to revisit the validity of these decisions.

Under a standard that is more focused on the misconduct itself, Respondent would urge that the discharge in this case was lawful, particularly in view of these circumstances:

1. The Collective Bargaining Agreement between Nexteer and United Autoworkers Local 699 contained a set of negotiated Shop Rules which provide in relevant part:

Violation of any of the following Shop Rules will be sufficient grounds for disciplinary action ranging from reprimand to immediate discharge, depending on the seriousness of the offense in the judgment of management.

* * *

9. Assaulting, threatening, intimidating, coercing or interfering with supervision.

* * *

13. Abusive language to Supervision or other employees.

368 NLRB No. 47 at 3.

³ In its Exceptions, Nexteer specifically challenged the judge’s reliance on these decisions. *See* Respondent’s Exceptions to Administrative Law Judge’s Decision, ¶ 9.

2. Nuffer-Bauer participated in training in 2017 which informed employees that Nexteer “will not tolerate any acts or threats of violence including inappropriate verbal or physical threats, intimidation, harassment, or coercion,” and that violations “may result in disciplinary action up to and including termination.”

3. Evidence was presented that 13 individuals have been terminated under the foregoing rules and no evidence was presented that Nuffer-Bauer’s termination was inconsistent with the treatment of others.

4. The December 13, 2017 meeting was scheduled for the express purpose of letting Nuffer-Bauer air his various concerns. As noted by the judge, there is no dispute that he took over the meeting, did most of the talking, and cut off Supervisor Benny Taylor and Human Resources Business Partner Allison Bell, not allowing them a reasonable opportunity to address his concerns. 368 NLRB No. 47 at 6. The judge also found that at various points Taylor and Bell told Nuffer-Bauer to “calm down” without success, which prompted Taylor to comment to Bell, “This is why we can’t get anything done . . .; [Bauer is] just so hostile”. *Id.*

5. Nuffer-Bauer stood up, began pointing at Taylor, and yelled, “fuck you” or “go fuck yourself” approximately one to three times. Nuffer-Bauer came within 12 to 16 inches of Taylor, who remained seated and leaned back in his chair as a consequence, concerned that he would be attacked.⁴ *Id.*

⁴ Despite the clear evidence on the record, the ALJ rejected Taylor’s testimony that he felt threatened, finding this testimony to be “self-serving and not credible based on the record here.” *Id.* at 7. In this regard, the ALJ’s decision is erroneous. The record established, and the ALJ agreed, Nuffer-Bauer had a history of being “verbally volatile.” *Id.* at 8. The ALJ nonetheless finds Nuffer-Bauer “had never been known to be violent.” *Id.* This ignores the reality that most instances of workplace violence do not occur in a vacuum. Instead, they typically escalate from verbal aggression to the eventual violence. Further, the ALJ did not just cavalierly ignore Nuffer-Bauer’s prior volatile behavior in reaching his decision. That would have been an error. The ALJ took it one step farther and viewed this history as a “plus” for Nuffer-Bauer because on numerous prior occasions Nuffer-Bauer had been “verbally volatile” but had not been violent. In the ALJ’s opinion on this basis, it was not reasonable to believe he was threatening on this occasion. *Id.* at 9. This assertion is simply illogical.

6. The judge found that the “provocation” factor weighed slightly against continued protection.

7. Nuffer-Bauer’s misconduct was not an isolated incident, but rather the latest in a series of incidents of misconduct for which he received discipline accepted by the union.⁵

Against this record, Nexteer respectfully requests that the Board reconsider its decision and, in particular, the conclusion that the “nature of the outburst” factor from *Atlantic Steel* did not weigh against Nuffer-Bauer retaining the protection of the Act. On the uncontroverted facts, Nuffer-Bauer violated collectively bargained work rules regarding intimidation. And while there was evidence that Nuffer-Bauer was once called an “asshole” by another supervisor, there was no evidence of the context for this remark, and certainly no proof that the supervisor stood over Nuffer-Bauer, 12 to 14 inches away, pointing and yelling this alleged epithet. Most importantly, since the judge’s credibility determinations were directly tied to and reliant upon the decisions in *Plaza Auto* and *Pier Sixty*, which holdings are now under review, such determinations do not deserve the traditional deference. Instead, this factor should be reevaluated in light of the outcome of the *General Motors* Notice process. Nexteer is confident that such a review will confirm the Board’s initial impression in this case that “an outburst of this character exceeds the limits of what an employer should be expected to endure.” 368 NLRB No. 47, fn. 2.

⁵ This lengthy disciplinary history is outlined in the judge’s decision at pp. 4-5. The judge incorrectly dismissed the relevance of the evidence of Bauer’s prior acts of misconduct based on the provision of the CBA which stated, “In imposing discipline on a current charge, Management will not take into account any prior infractions which occurred more than twenty-four months previously.” [Article VII, Section 3A] Nexteer offered this evidence not to support the discharge decision under the CBA, but rather to underscore the point that Bauer’s outburst in the December meeting was not an isolated, spontaneous event, but rather another in a long line of insubordinate actions. In this regard, the judge’s conclusion that Nuffer-Bauer’s outburst resulted from “animal exuberance,” and was “impulsive” under *Plaza Auto* is belied by his overall record of insubordinate conduct.

For all these reasons, Nexteer asks the Board to reconsider its prior ruling and to stay this case until it determines in *General Motors* what the appropriate standard should be in cases such as this one.

Respectfully submitted,

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**LOCAL 699, INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO,**

Charging Party.

CERTIFICATE OF SERVICE

I do hereby certify that on September 18, 2019, a true and correct copy of the foregoing Brief was *Electronically Filed* on the NLRB's website <http://www.nlr.gov>.

Also, I do hereby certify that a true and correct copy of the foregoing Brief has been served by electronic mail this 18th day of September, 2019 on: Stuart Shoup at SShoup@uaw.net and Scott Preston at scott.preston@nlrb.gov.

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